



**Submission by the  
Commonwealth Ombudsman**

**PROPOSED SMALL BUSINESS AND  
FAMILY ENTERPRISE OMBUDSMAN**

Submission by the Commonwealth Ombudsman, Colin Neave

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## INTRODUCTION AND SUMMARY

The Australian Small Business Commissioner (the Commissioner) currently plays an important role for small businesses and family enterprises in Australia by:

- providing information and assistance to small businesses, such as referral to dispute resolution services;
- representing small business interests and concerns to the Australian Government; and
- working with industry and government to promote a consistent and coordinated approach to small business matters.<sup>1</sup>

On 30 April 2014, the Government released a discussion paper (the Discussion Paper) on the proposal to transform the Commissioner into a Small Business and Family Enterprise Ombudsman (the SBFE Ombudsman).

The key responsibilities of the SBFE Ombudsman would include being a:

- concierge for dispute resolution;
- Commonwealth-wide advocate for small businesses and family enterprises;
- contributor to the development of small business friendly Commonwealth laws and regulations; and
- single-entry point agency through which Commonwealth assistance and information regarding small business can be accessed.

The Treasury has sought input on the nature and scope of the four key responsibilities of the proposed SBFE Ombudsman and how best to provide the SBFE Ombudsman with appropriate powers to deliver benefits to Australian small businesses.

The Commonwealth Ombudsman supports the substance of the enhancements to the role of the Commissioner. However, we have strong concerns about the use of the title 'Ombudsman' in relation to this role, where one of the key responsibilities is advocacy.

We suggest that there are other more appropriate titles that could be considered, for example:

- Small Business and Family Enterprise Advocate,
- Small Business and Family Enterprise Authority,
- Agent-General of Small Business and Family Enterprise, or
- Inspector-General of Small Business and Family Enterprise.

We are also concerned about the potential for confusion regarding the respective roles of the Commonwealth Ombudsman and SBFE Ombudsman, as well as possible duplication of effort in relation to complaint handling and reviews or audits of Australian Government agencies. We suggest that the legislation underpinning the SBFE Ombudsman should take account of the true extent of the Commonwealth Ombudsman's jurisdiction in order to more clearly and accurately distinguish between the roles of these bodies.

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<sup>1</sup> Australian Small Business Commissioner website: <http://www.asbc.gov.au/about/our-role>

We also note that, depending on the manner in which the proposed SBFE Ombudsman is established, it may fall within the jurisdiction of the Commonwealth Ombudsman. In the event that we were able to receive and consider complaints about actions and decisions taken by the SBFE Ombudsman, the scope of the Commonwealth Ombudsman's jurisdiction would be significantly expanded and consideration would need to be given to the appropriate level of funding for this role.

## **BACKGROUND**

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- assisting people to resolve complaints about government administrative action;
- developing policies and principles for accountability; and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Small businesses often contact the Commonwealth Ombudsman to complain about the administrative actions of Australian Government agencies such as the Australian Taxation Office, the Australian Securities and Investments Commission, Australia Post and Australian Customs and Border Protection Service.

The office of the Commonwealth Ombudsman carefully assesses all complaints received. If an investigation is conducted and the Commonwealth Ombudsman considers that the relevant agency's actions or decisions were wrong or unreasonable in all the circumstances, we can recommend that the agency take action to remedy the problem. The Commonwealth Ombudsman has limited power to investigate complaints about private individuals or companies<sup>2</sup>.

## **RESPONSE TO PROPOSAL**

The Commissioner currently plays an important role in providing assistance to small businesses and family enterprises in Australia. The proposed enhancements to the Commissioner's role will allow it to build on its already impressive reputation as an advocate for small business and the Commonwealth Ombudsman supports the substance of these enhancements.

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<sup>2</sup> The Commonwealth Ombudsman can investigate complaints about goods and services delivered by contractors for and on behalf of the Australian Government. In addition, the Postal Industry Ombudsman (PIO) can investigate complaints about companies registered with the PIO scheme and the Overseas Students Ombudsman can investigate complaints about registered private education providers.

However, we are concerned about the use of the title 'Ombudsman' in relation to this role, as well as the potential for confusion regarding the respective roles of the Commonwealth Ombudsman and SBFE Ombudsman.

## The Ombudsman title

The most obvious element of the proposal is the change of title from the Commissioner to the SBFE Ombudsman. The Commonwealth Ombudsman is seriously concerned about this aspect of the proposal, as the SBFE Ombudsman does not meet the criteria considered necessary in order to be described as an Ombudsman.

Use of the term Ombudsman in this context is therefore misleading and has the potential to damage the 'Ombudsman' brand that has been developed by Ombudsman offices throughout Australia over the last 40 years.

### 1. Accepted definition of 'Ombudsman'

The Australian and New Zealand Ombudsman Association (ANZOA), of which the Commonwealth Ombudsman is a member, is acknowledged as the peak body for Ombudsmen in Australia and New Zealand. In 2010, ANZOA released a policy statement outlining the essential criteria for describing a body as an Ombudsman in light of the globally accepted Ombudsman model and its 200 year history. In summary, ANZOA's policy is that a body must:

- be **independent** – an ombudsman must not be subject to direction, and must not be, or be able to be perceived to be, an advocate for any group;
- have a clearly defined **jurisdiction**;
- have sufficient **powers** to investigate matters within its jurisdiction, both in relation to individual complaints and systemic issues;
- be **accessible**;
- afford **procedural fairness** – the actions of the ombudsman must not give rise to a reasonable apprehension of partiality, bias, or prejudice; and
- be **accountable**.

The Discussion Paper describes the key responsibilities of the proposed SBFE Ombudsman to be a:

- concierge for dispute resolution;
- Commonwealth-wide advocate for small businesses and family enterprises;
- contributor to the development of small business friendly Commonwealth laws and regulations; and
- single-entry point agency through which Commonwealth assistance and information regarding small business can be accessed.

Importantly, the proposed responsibilities of the SBFE Ombudsman make it clear that the Government intends that its role will be centred on *advocacy* for the interests of small business (this is made expressly clear in the second responsibility and is inherent in the remaining responsibilities as outlined above).

A body that is fundamentally concerned with advocacy for a particular group cannot fall within the definition of an Ombudsman, as it is not considered sufficiently independent. An independent and impartial Ombudsman cannot be an advocate for either a complainant or Government. If an Ombudsman takes on an advocacy role, it undermines the trust of both parties in a dispute and more generally diminishes the critical role Ombudsmen play in addressing complaints and improving the standard of public administration as a whole. The efficacy of private sector industry Ombudsman also relies on strict independence and impartiality.

We note that the Discussion Paper outlines a number of options for the method of appointment of the SBFE Ombudsman and suggests that the SBFE Ombudsman could be made a statutory appointment in order to guarantee its independence. However, this would be insufficient to cure the partiality that is inherent in the proposed SBFE Ombudsman adopting an advocacy role. True independence requires both freedom from direction and complete impartiality.

It is clear that none the proposed functions of the SBFE Ombudsman conclusively satisfy the fundamental requirements of an Ombudsman as defined by ANZOA and in this context, use of the term 'Ombudsman' would be misleading.

## **2. A broader definition of 'Ombudsman'?**

The Discussion Paper suggests that a 'broader definition of an ombudsman being a designated person who advocates for another lends itself to the Government's envisaged role for the SBFM Ombudsman'.<sup>3</sup>

The Commonwealth Ombudsman is firmly of the view that a body should not be described as an Ombudsman unless it complies with the six essential criteria as identified by ANZOA.

The suggested stretching of the concept of Ombudsman has the potential to diminish the Australian public's confidence in the role and independence of the Ombudsman institution as a whole. Over the last 40 years, all Australian jurisdictions have established an Ombudsman, and in more recent times, a number of private sector industry Ombudsmen have also been created. Successive governments in all jurisdictions have invested in the public perception of Ombudsmen, leading to positive recognition and high levels of trust in the 'Ombudsman' brand. This public perception is a critical element of the success of the Ombudsman offices and careful application of the Ombudsman name in the future will ensure that this is preserved.

The office of the Commonwealth Ombudsman has been seeking to protect the integrity of the 'Ombudsman' name for many years; in a speech in 2008 previous Commonwealth Ombudsman John McMillan stated:

*"We work hard...to convey the subtle message that we are forceful in pursuing legitimate complaints but do not act as advocates for complainants. Equally, it is part of our role to explain at times why a government or business agency acted reasonably, but we are not their spokesperson. The office relies principally on persuasion, cooperation and recommendation, rather than upon coercion, litigation or aggression. Those are subtle messages that become harder to convey if the terrain is populated by offices, called ombudsman offices, that play more of an advocacy or combat role."<sup>4</sup>*

<sup>3</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 7

<sup>4</sup> John McMillan, "What's in a name? Use of the term 'Ombudsman'" *Speech*, 22 April 2008

The term is considered so valuable that some jurisdictions have taken legislative action to protect it. In New Zealand, for example, the *Ombudsmen Act 1975* (NZ) states under its 'Protection of Name' clause that:

*"No person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade, or occupation, or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman."*<sup>5</sup>

Based on these reasons, the Commonwealth Ombudsman cannot support the proposal to call the enhanced Commissioner the SBFE Ombudsman. While it may be tempting to take advantage of the high levels of trust in the Ombudsman brand by attaching it to other policy initiatives, public respect for the independence, integrity and impartiality of Ombudsman offices is at risk if bodies that do not conform to the accepted model are inappropriately described as an Ombudsman.

### **3. Suggested alternatives to the 'Ombudsman' title**

Acknowledging that a new title may be helpful in signalling the change in the role of the Commissioner, we would suggest that there are other more appropriate titles that could be considered, for example:

- Small Business and Family Enterprise Advocate,
- Small Business and Family Enterprise Authority,
- Agent-General of Small Business and Family Enterprise, or
- Inspector-General of Small Business and Family Enterprise.

These titles are more compatible with the key functions of the enhanced Commissioner and also allow for a clearer demarcation between the role of the Commonwealth Ombudsman and the enhanced Commissioner.

### **Demarcation of roles**

A key area of concern identified by the Commonwealth Ombudsman is how the proposed SBFE Ombudsman's remit will be defined in order to avoid duplicating existing services offered by the Commonwealth Ombudsman. Potential problems which could stem from an unclear distinction between the role of the Commonwealth Ombudsman and the proposed SBFE Ombudsman include:

- duplication of effort by the Commonwealth Ombudsman and SBFE Ombudsman when determining which body should take carriage of a complaint and/or which body is best placed to conduct a systemic review of an Australian Government agency's practice which affects small business;
- duplication of effort by agencies subject to the jurisdiction of the Commonwealth Ombudsman and SBFE Ombudsman in responding to enquiries and investigations;
- confusion for complainants regarding which dispute resolution service to use; and

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<sup>5</sup> *Ombudsman Act 1975* (NZ), s28A.

- the possibility of 'jurisdiction shopping' when complainants are dissatisfied with the first response they receive.

### 1. Complaint handling

The Discussion Paper indicates that the proposed SBFE Ombudsman will act as a concierge for dispute resolution but will also have the power to formally investigate complaints made by small businesses. To put this into practice, it is proposed that the legislation underpinning the SBFE Ombudsman will allow it to choose the most appropriate resolution services for particular disputes on a case-by-case discretionary basis,<sup>6</sup> with possible outcomes including:

- referral to other existing bodies – for example, a complaint about 'maladministration' by a government body will be referred to the Commonwealth Ombudsman;<sup>7</sup> or
- use of the SBFE Ombudsman's own dispute resolution services and/or formal investigation by the SBFE Ombudsman.

We have concerns about how the proposed SBFE Ombudsman's remit and discretionary power will be defined, especially in relation to the circumstances in which the SBFE Ombudsman should refer a complaint to the Commonwealth Ombudsman or when it can investigate a complaint about an Australian Government agency itself. Although the Discussion Paper acknowledges that the legislation underpinning the SBFE Ombudsman's complaint handling function will clearly demarcate the respective roles of the SBFE Ombudsman and the Commonwealth Ombudsman, it appears that the SBFE Ombudsman would have the power to investigate complaints about Australian Government agencies when it considers that the complaint does not involve an allegation of 'maladministration'.

In our view, the definition of 'maladministration' offered by the Discussion Paper mischaracterises the Commonwealth Ombudsman's existing role, which has ramifications for the analysis of the SBFE Ombudsman's scope to investigate complaints about Australian Government agencies. The Discussion Paper defines a 'matter of administration' as maladministration and possible corruption issues which undermine the integrity and probity in government, which was a definition previously provided by the Commonwealth Ombudsman specifically in reference to the Consultation on Victoria's Anti-Corruption Commission. This definition does not reflect the totality of the Commonwealth Ombudsman's role.

The *Ombudsman Act 1976* (Cth) states that the Commonwealth Ombudsman may 'investigate action, being action that relates to a matter of administration' of a Commonwealth Government agency.<sup>8</sup> The term 'matter of administration' is not defined under the Ombudsman Act and, consistent with the beneficial nature of the legislation, it is interpreted in its broad sense. Matters investigated by the Commonwealth Ombudsman can include policy development, commercial conduct, the exercise of statutory responsibilities, law enforcement activities, compensation actions and decisions, accessibility to, and quality of, information and advice provided by agencies, and administration of executive grant schemes.

<sup>6</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 15.

<sup>7</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 9.

<sup>8</sup> *Ombudsman Act 1976* (Cth), s 5(1)

The Ombudsman can also investigate the actions of Commonwealth service providers, that is, contractors providing goods or services for or on behalf of an agency to the public.

We communicate to the public that 'we can investigate complaints about the actions or decisions of Australian Government agencies to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair'.<sup>9</sup>

The Discussion Paper acknowledges that the legislation underpinning the dispute resolution function would need to clearly demarcate the role of the proposed SBFE Ombudsman from that of the Commonwealth Ombudsman<sup>10</sup>.

We agree that careful consideration should be given to the scope and powers of the new role to avoid possible duplication of functions and responsibilities. This will avoid both bodies spending unnecessary time assessing whether a complaint is in its jurisdiction, will better set the expectations of complainants in relation to the dispute resolution mechanisms available to them, and will also remove 'forum shopping' opportunities for the multiple handling of single concerns or grievances.

Further to this point, we suggest that a mechanism should be developed to formally manage the interface between the Commonwealth Ombudsman and the proposed SBFE Ombudsman – for example, a complaint transfer agreement could clearly set out the circumstances in which each body would accept the transfer of a complaint from the other, whether the complainant's consent would be required before the transfer of a complaint, and expectations about communication with the complainant, as well as the possibility of returned transfers.

## **2. Reviews and audits of Australian Government agencies**

The Discussion Paper suggests that the SBFE Ombudsman 'could have a role in reviewing broader practices of Australian Government agencies such as the timeliness of payments to small business or the channels used by agencies and regulators to communicate with small businesses'.<sup>11</sup> There is also a further suggestion that the proposed SBFE Ombudsman could conduct audits of the 'interactions of Australian Government agencies, contractors and subcontractors, with small businesses and family enterprises'.<sup>12</sup>

These aspects of the proposal appear to disregard the Commonwealth Ombudsman's existing own motion powers and our ability to conduct systemic investigations (which may stem from the narrow definition of the Commonwealth Ombudsman's jurisdiction relied on in the Discussion Paper). This aspect of the proposal therefore also has the potential to result in a duplication of effort and another level of regulation for agencies where one already exists.

The Commonwealth Ombudsman therefore suggests that any proposal to give the SBFE Ombudsman a role reviewing practices of Australian Government agencies should take account of the true extent of the Commonwealth Ombudsman's jurisdiction in order to more clearly and accurately distinguish between the roles of

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<sup>9</sup> Commonwealth Ombudsman website: <http://www.ombudsman.gov.au/pages/making-a-complaint/complaints-the-ombudsman-can-investigate/australian-government-agencies-and-services.php>

<sup>10</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 11

<sup>11</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 19

<sup>12</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 22



the respective bodies. There may also be merit in considering a mechanism where the Commonwealth Ombudsman and proposed SBFE Ombudsman consult each other in relation to future work plans involving reviews of Australian Government agencies in relation to small business in a further effort to avoid duplication of effort.

### **3. Jurisdiction over the SBFE Ombudsman**

The manner in which the new role is established may impact on whether it falls within the jurisdiction of the Commonwealth Ombudsman<sup>13</sup>. If the SBFE Ombudsman is established in such a way that it falls within the definition of a prescribed authority under the Ombudsman Act and is not otherwise excluded from the Commonwealth Ombudsman's jurisdiction, the Commonwealth Ombudsman will be able to receive and consider complaints about the actions and decisions taken by the SBFE Ombudsman.

In the event that this was to occur, the scope of the Commonwealth Ombudsman's jurisdiction would be significantly expanded. Although disputes between small businesses and Australian Government agencies are currently within our jurisdiction, the other types of business disputes which the proposed SBFE Ombudsman intends to focus on (international business disputes, interstate business disputes, and disputes under industry codes of conduct)<sup>14</sup> are not.

If the SBFE Ombudsman were to fall within the jurisdiction of the Commonwealth Ombudsman, we would have the ability to receive complaints from small businesses about disputes which we previously had no role in relation to. Although our focus would be on considering the actions and decisions of the SBFE Ombudsman, rather than on the primary disputes, there is a potential for our office to receive a significant volume of new work. The Commonwealth Ombudsman does not have sufficient resources to undertake additional unfunded work.

If the SBFE Ombudsman is established in a way that would bring it under the jurisdiction of the Commonwealth Ombudsman, consideration should be given to the appropriate level of funding for the handling of complaints escalated from the SBFE Ombudsman to the Commonwealth Ombudsman.

In exploring the potential method of appointment, the Discussion Paper suggests that, to ensure the independence of the SBFE Ombudsman, it might be that a dismissal for misconduct or incapacity could only take place after a review by the Commonwealth Ombudsman.<sup>15</sup>

Reviewing a decision to dismiss a person from a position in a Government body (whether that person is appointed under contract, as a public servant, or as a statutory appointment) is outside the scope of the Commonwealth Ombudsman's role.

In fact, the Ombudsman Act explicitly prohibits the Ombudsman from investigating action taken with respect to the promotion, termination of appointment or discipline of a person employed in the Australian Public Service or the service of a prescribed authority<sup>16</sup>. The Act also excludes the Ombudsman from investigating an action taken by a Department of or by a prescribed authority with respect to the appointment of a

<sup>13</sup> See 'prescribed authority', *Ombudsman Act 1976* (Cth), s 3

<sup>14</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 11

<sup>15</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 29

<sup>16</sup> *Ombudsman Act 1976* (Cth), s 5(2)(d)

person to an office or position established by or under an enactment, not being an office or position in the Australian Public Service or an office in the service of a prescribed authority.<sup>17</sup>

We suggest that a more appropriate mechanism for the review of dismissal on the grounds of misconduct or incapacity be considered.

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<sup>17</sup> *Ombudsman Act 1976* (Cth), s 5(2)(g)